Office-Supreme Court, U.S.
FILED
JUN 20 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 241

SUNKIST GROWERS, INC., a corporation, and the EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,

Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Respondents.

RESPONDENTS' PETITION FOR REHEARING.

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RESPONDENTS' PETITION FOR REHEARING.

Pursuant to the provisions of Rule 58 Respondents herein submit their Petition for Rehearing on the following grounds:

I.

The Conclusion That the Two-Issue Rule of Maryland v. Baldwin, 112 U. S. 490, 493 (1884) Is Applicable Merits Reconsideration.

The Court failed to consider that part of the charge which authorized a verdict for Respondents in reaching its conclusion that a verdict could have been based

on the acts of Petitioners and/or their coconspirator Exchange Lemon.

The Court applied the two-issue rule on the ground that ". . . the instructions quite plainly left it open for the jury to base their verdict upon a finding of conspiracy among petitioners and Exchange Lemon." (Sl. Op. p. 7.) In reaching this conclusion the Court quotes from parts of the charge to the jury (Sl. Op. pp. 5, 6)[1] including excerpts from two paragraphs thereof (Sl. Op. p. 6), each of which was based on instructions requested by petitioners and which concluded with the language ". . . Your verdict must be for the defendants." [R. 3711-3712.] The opinion nowhere refers to the *only* instruction in the charge that dealt with the factual findings required to support a plaintiff's verdict. [R. 3703.] This instruction, to which the opinion makes no reference, and which was presumably not considered by the Court, required a finding of a third party or a *United States v. Borden Co.*, 308 U. S. 188 (1939), type of conspiracy as a basis of any jury verdict for the plaintiff. A consideration of *this* instruction would have made it unnecessary for the Court to apply the two-issue rule or to engage in speculation or "conjecture" as to the "probable" basis of the verdict (Sl. Op. p. 7) or to

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[1]The instruction [Sl. Op. p. 5, R. 146, 3688] was based on the general corporate law of conspiracy as stated by this Court in *Kiefer-Stewart v. Seagram*, 340 U. S. 211, 215, and *United States v. Yellow Cab Co.*, 332 U. S. 218, 229. The opinion nowhere refers to these decisions.

assume, contrary to the record, that ". . . the instructions (presumably as a whole) quite plainly left it open for the jury to base their verdict upon a finding of conspiracy among Petitioners and Exchange Lemon." (Sl. Op. p. 7.)[2]

II.

The Question as to Whether the Use of Separate Corporations by Petitioners Had Economic Significance in Itself, or Whether Outsiders Considered and Dealt With the Three Entities as Independent Organizations, Was Not Fully Argued or Considered by the Court.

The opinion of the Court is based on the single enterprise theory that two or more cooperative corporations are incapable, as a matter of law, of conspiring to violate the Sherman Act. The opinion justifies the application of the theory on the ground that "there is no indication that the use of separate corporations had economic significance in itself, or that outsiders considered and dealt with the three entities as independent organizations." (Sl. Op. pp. 10-11.) The record contains substantial and undisputed evidence to the contrary, of which the following is but a part.

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[2]The record is replete with references to the fact that the only theory of liability argued by Respondent to the jury was that based on a third party, *Borden*-type conspiracy. The Court's view of the "probabilities" of the basis of the jury's verdict is also contrary to the view of the trial Court as to those "probabilities" when it stated: ". . . If there is a verdict for the plaintiff you can rest assured TreeSweet and Silzle will be listed as co-conspirators and not Lemon." [R. 3463.]

Exchange Lemon regarded its economic and legal interests sufficiently separate from those of Sunkist and Exchange Orange to have separate counsel represent those interests in the pending litigation. [R. 52, 55, 64.] Exchange Lemon dealt with independent processors as a separate entity [R. 459; Ex. 31, E. 377] as did Exchange Orange, and "outsiders" dealt with the three entities as independent and legally separate organizations. [Exs. 16, 17, 17a, 18, 31, E. 223, 229, 233, 238, 377.]

The undisputed evidence shows that the separate corporate entity of Exchange Orange was utilized by Petitioners to achieve their illegal monopolization of the market for California citrus juice products. For example, Sunkist was the only entity which to "outsiders" was authorized to sell oranges or citrus juices to independent processors. [R. 600, 614, 638, 685.] Yet Exchange Orange did, in fact, sell and make product oranges and juices available to the competitors of Sunkist in the citrus juice market at discriminatory prices, and under discriminatory contracts, to achieve such illegal monopolization. [Exs. 5; 6, 7; 16; 17A; 25; 49; E 43, 119-147, 303, 314, 358, 481.] The record contains numerous other examples which establish the fact that "outsiders" such as respondents were required to deal with the three entities as separate and independent organizations. Such evidence was not referred to in the briefs or discussed in oral argument, and from the language of the opinion such evidence was obviously not considered by the Court in reaching its conclusion that the corporate veil of Petitioners and Exchange Lemon should be torn aside and the single

enterprise theory applied to the activities of their respective, separate corporate entities.

A rehearing should be granted so that such undisputed record evidence can be more fully presented, discussed and considered by the Court.

III.

The Two-Issue Rule of Maryland v. Baldwin, 112 U. S. 490, 493 (1884), if Applicable, Merits Reconsideration.

The ruling in *Maryland v. Baldwin*, 112 U. S. 490, 493 (1884) as applied by the Court in the instant case, is based on obiter dicta and is contrary to the principle announced by this Court in *Snyder v. United States*, 112 U. S. 216, 217 (1884). The Court applied the rule in *Baldwin* on the theory the instructions in the instant case permitted the jury to find liability where an exemption from liability might exist. The *Baldwin* case did not deal with any error in instructions. The *Snyder* case was one for a civil forfeiture in which this Court held that a general verdict upon several counts, seeking in different forms one object, must be upheld if one count of the complaint is good. The instant case is more like the *Snyder* case than *Baldwin*, and is certainly not the type of case to which the rule in *Baldwin* should be extended.

Liability was established in the instant case after extended litigation, which was based on statutes which express a public policy of encouraging private enforcement of the antitrust laws by treble damage actions. The application and extension of the rule in *Baldwin* to the instant case deprives a small business concern which was forced into bankruptcy by the commission

of acts, which obviously constitute a violation of the antitrust laws if committed with third persons, of the benefits of a jury verdict.

The application of the two-issue rule of *Baldwin* to private treble damage enforcement actions which it is the policy of the law to encourage—not discourage—not only effects a grave injustice by depriving a damaged bankrupt of the benefits of a jury verdict acquired after extensive and bitterly fought litigation, but is also contrary to the persuasive reasoning and authority of *Berger v. Southern Pacific Company et al.*, 144 Cal. App. 2d 1 [1956]. The California Court in *Berger* upheld a general verdict for the plaintiff where the verdict could be sustained on one of several different counts or theories of liability.

While there is an admitted conflict on the question of the applicability of the two-issue rule to cases wherein a plaintiff has secured a verdict which can be sustained on only one of the two or more theories of liability on which the case was tried, it is submitted that where (1) the instructions and theory of liability are based on the decisions of this Court (such as *Kiefer-Stewart v. Seagram* and *United States v. Borden Co., supra* (308 U. S. 188 [1939]), and (2) neither the language nor the history of the exemptive act relied on (Capper-Volstead) contains anything to justify the Court in extending a granted immunity beyond its expressed terms, a general verdict in a treble damage enforcement action should be upheld if (1) it can be justified on the theory on which the case was tried or (2) there is admitted liability on such theory. The verdict should not be set aside on pure conjecture, or speculation by the Court as to whether the jury *might* have

based its verdict on a novel theory of the law which had not been established by this court at the time the verdict was rendered.

IV.

The Allegations of the Second Amended Complaint, the Undisputed Evidence, and the Charge to the Jury Were Sufficient to Justify an Affirmance of the Judgment and a Ruling That Petitioners, as a Single Entity, Engaged in Anticompetitive Activities in Violation of Sections 1 and 2 of the Sherman Act.

The decision raises and leaves unanswered the question as to whether absent a combination with third parties, the conduct of Petitioners and Exchange Lemon as a single entity constituted anticompetitive conduct in violation of sections 1 and 2 of the Sherman Act (15 U. S. C. Secs. 1, 2). While the case was not tried on this theory, Respondents should not be deprived of the benefit of their jury verdict even under the two-issue rule if the pleadings and the undisputed evidence established liability on this theory. A rehearing would establish such liability.

The acts which Petitioners committed, and which are alleged to constitute the violation in the instant case, consisted of (1) entering into discriminatory contracts with competitors, and (2) abusing an admitted legal monopoly power over product oranges by fixing and maintaining the selling price of such oranges at a monopolistic price while making such oranges available to competitors under discriminatory contracts and arrangements which were denied Respondents. [Second Amended Complaint R. 259 (d); acts (c), (d),

(e), (f), 266-272.] The contracts and arrangements were alleged to have been entered into, and the exercise of the monopoly control over the selling price of product oranges was alleged to have been exercised in violation of both sections 1 and 2 of the Sherman Act (15 U. S. C. Secs. 1, 2) for the purpose of eliminating competition and to effect and achieve an illegal monopolization of the market for California citrus juices. [R. 265, R. 271, R. 3311-14, 3318, 3320, 3323, 3343, 3428-3429.] The jury was fully instructed on monopoly power, its abuse, and the legality of the discriminatory contracts which Exchange Orange awarded the competitors of Respondents and defendant Sunkist. [R. 3703, 3706-3710.]

It is submitted that the allegations of the amended complaint, and the undisputed evidence in support thereof, clearly constitute "anticompetitive activities" which are outside the "legitimate objects" of a cooperative and establish a violation of the Sherman Act even under a single entity theory under the ruling of this Court in *Maryland & Virginia Milk Producers Assn. v. United States,* 362 U. S. 458 (1960). The language of Mr. Justice Black in *Maryland Milk* is particularly applicable in support of the Petition for Rehearing. Mr. Justice Black therein stated:

> "We are satisfied that the allegations of the complaint and the statement of particulars, only a part of which we have set out, charged anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative that, if provided, they would constitute clear violations of §2 of the Sherman Act by this Association, . . ." (p. 468.)

The ruling of the Court in its present posture has, in effect, legalized the conduct of the separate corporate entities, on the theory they are a single entity, even though the same conduct would be illegal if done in combination with "outsiders." It is accordingly submitted that the Court should grant a rehearing, and pass upon the unanswered question the opinion poses as to whether the same conduct constitutes a violation of sections 1 and 2 of the Sherman Act when resorted to by a single operating unit to achieve an illegal monopolization of the market for California citrus juices.

Conclusion.

It is submitted that a rehearing should be granted in the instant case for the following reasons:

The jury found that a small, independent competitor of Petitioners was put out of business by the "anticompetitive activities" and conduct of Petitioners. This finding stands, whether based on a theory that the activities and conduct complained of were committed in combination with "outsiders" or by a single entity. In either event, the acts were alleged to have been committed, and the jury found that they were committed for the purpose of eliminating competition and achieving an illegal monopolization of the market for California citrus juices. The decision of the Court, in effect, thus legalizes conduct of cooperatives, which would be illegal if committed in combination with "outsiders". To reach this conclusion, the Court necessarily disregarded the separate corporate entities of Petitioners and its prior rulings in the *Seagram* and *Yellow Cab* cases, and applied the obiter dicta two-issue

rule of *Baldwin*. The rule in *Baldwin* is contrary to the rule of *Snyder*, to which the instant action is more comparable.

The single enterprise theory was applied without reference to or consideration of extensive undisputed record evidence that "outsiders," dealt with the three entities as separate and independent organizations, and that the separate entities did have economic significance in achieving an illegal monopolization of the market for California citrus juices by the use of their separate economic power. Such evidence was not referred to in petitioners' brief or oral argument, and can only be made available to the Court for its consideration by a rehearing.

Assuming arguendo that the single enterprise theory is applicable to cooperatives under *Capper-Volstead*, reasonable minds could not differ that undisputed evidence of their "anticompetitive activities" as a single entity, in the instant case, would and did violate the Sherman Act within the ruling of this Court in *Maryland & Virginia Milk Producers Assn. v. United States*, *supra* (362 U. S. 458 [1960]).

The effect of the instant decision is to frustrate and render nugatory the announced Congressional policy of encouraging private antitrust enforcement actions. Jury verdicts in such cases, which can be legally sustained on a theory of violation on which the case was tried, should not be lightly set aside on purely tech-

nical grounds in disregard of such announced Congressional policy.

A rehearing should accordingly be granted.

Respectfully submitted,

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I certify that the within Petition for Rehearing is presented in good faith and not for delay.

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